Office - Supreme Court, U.S.
FILED
SEP 30 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2188

In The
Supreme Court of the United States
October Term, 1981

THE STATE OF MONTANA, et al.,
Petitioners,

vs.

NORTHERN CHEYENNE TRIBE OF THE NORTHERN CHEYENNE INDIAN RESERVATION, et al.,
Respondents.

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

MICHAEL T. GREELY
Attorney General for
The State of Montana

HELENA S. MACLAY
DEIRDRE BOGGS
Special Assistant Attorneys General
P. O. Box 8957
Missoula, Montana 59807
(406) 721-5440

Counsel for State of Montana
(and counsel to be served)

(additional counsel on inside cover)

COCKLE PRINTING CO., 2111 Douglas St., Omaha 68102

CALE CROWLEY
CROWLEY, HAUGHEY, HANSON,
TOOLE & DIETRICH
P. O. Box 2529
Billings, Montana 59103

MAURICE R. COLBERG, JR.
HIBBS, SWEENEY, COLBERG,
JENSEN & KOESSLER
P. O. Box 2175
Billings, Montana 59103

JAMES E. SEYKORA
BERT W. KRONMILLER
P. O. Drawer S
Hardin, Montana 59034

DOUGLAS Y. FREEMAN
631 N. Center
Hardin, Montana 59034

Counsel for Private Petitioners

TABLE OF AUTHORITIES

Pages

Case

Colorado River Water Conservation District v. United States, 424 U. S. 800 (1976) 3

Statute

28 U. S. C. § 1362 ..... 2, 4

No. 81-2188

In The

Supreme Court of the United States

October Term, 1981

THE STATE OF MONTANA, et al.,

Petitioners,

vs.

NORTHERN CHEYENNE TRIBE OF THE NORTHERN CHEYENNE INDIAN RESERVATION, et al.,

Respondents.

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Neither of the two briefs filed by respondents diminishes the compelling reasons for certiorari set forth in the petition. The memorandum of the United States simply underscores the urgent need for the granting of certiorari on all questions presented by petitioners in this case. The United States in effect confesses error on the disclaimer issue and joins petitioners in urging the grant of certiorari on other issues presented. Memorandum for the United States 8-9.

Predictably, the single brief of the remaining respondents, the Crow Tribe, Confederated Salish & Kootenai Tribes, Assiniboine and Sioux Tribes, Northern Cheyenne

Tribe, and James Bowen (hereinafter collectively called "Tribes"), opposes the grant of certiorari. The Tribes contend that the questions presented by petitioners for review do not include what the Tribes perceive as independent, supportable and non-reviewable grounds for the Ninth Circuit judgment. Those grounds, artificially segregated from the remainder of the opinion, are that the United States has "disabling conflicts of interest" which render any state court proceedings inadequate, and that the McCarran Amendment does not require the dismissal of actions brought by Indian tribes under 28 U. S. C. § 1362. The Tribes' evasion of the questions presented in the petition depends completely upon their reconstruction of the Ninth Circuit opinion.

The Ninth Circuit opinion is divided into five sections entitled as follows: I. Procedural History; II. The Disclaimer Issue; III. The *Akin* Factors; IV. Conclusion; V. The Crow Tribe Appeal. Pet. App. 27, 28, 38, 45. The questions presented in the petition do not include Section V, the Crow Tribe Appeal. However, a fair reading of the questions presented and of the opinion of the Ninth Circuit, shows that question 3 of the petition includes all of the *Akin* factors set forth by the Ninth Circuit. Pet. App. 38-45. The Ninth Circuit opinion expressly includes "conflicts of interest" and "jurisdiction under 28 U. S. C. § 1362" as *Akin* Factors. Pet. App. 43-45. The Tribes do acknowledge in footnotes 14 and 15 of their brief that the Ninth Circuit opinion could be read to include each of these items as *Akin* factors, but then the Tribes lamely argue that "the opinion is better understood" as using each of these factors as an independent ground for the Ninth Circuit's judgment. Tribes' Brief 11. We submit that the Tribes'

revisions of the Ninth Circuit opinion, and their unfair reading of the petition, demonstrate wishful thinking on the part of the Tribes, rather than a clear understanding of the Ninth Circuit opinion.

The Tribes do not contend that the Ninth Circuit correctly decided the disclaimer issue. Like the United States, they agree that the disclaimer issue is worthy of certiorari.[1] The disclaimer issue, however, is so inextricably woven into the Ninth Circuit's opinion that if the disclaimer issue is wrong, then the *Akin* factor portion of the opinion is wrong. If the disclaimer issue merits review by this court, then so does the remainder of the Ninth Circuit opinion.

The crux of the *Akin* factor portion of the Ninth Circuit opinion is that because of the disclaimer language in Montana's Enabling Act and Constitution, the state proceedings cannot be comprehensive because Indian reserved water rights cannot be included in the state proceedings. Absent the bar of the disclaimer language, however, the state proceedings may include Indian water rights. Pursuant to the McCarran Amendment and this Court's holding in *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976) ("*Akin*"), the state may name the United States as a defendant and adjudicate Indian reserved water rights in state court.[2]

---

[1] The Tribes assume "for present purposes that the disclaimer issue, which is also before this Court in No. 81-2147, *Arizona v. San Carlos Apache Tribe*, would otherwise be worthy of consideration on certiorari . . ." Tribes' Brief 6.

[2] The United States itself recognizes that this is currently the law, but asks this Court to revise its holding in *Akin*. Memorandum of the United States 16. The United States also proposes to amend its complaints in the district court in order to fit the new rule it requests. Memorandum of the United States 22, n. 25.

The Tribes have emphasized the conflicts of interest and section 1362 aspects of the Ninth Circuit opinion as their only means of escaping the purview of the McCarran Amendment and *Akin*. However, to say that the Tribes have independent jurisdiction to sue in the federal court under 28 U. S. C. § 1362 does not answer the question posed by the petitioners—does the McCarran Amendment and its underlying policy of avoiding duplicative litigation require affirmance of the district court's dismissal of the complaints of both the United States and the Tribes in this case? Indeed, the Tribes' argument is not determinative if the states may name the United States as a defendant in state court and adjudicate Indian reserved water rights held by the United States as trustee.

The conflict of interest argument, then, is the last remaining way for the Tribes to avoid the petitioners' argument (as conceded by the United States) that the United States may be named as a defendant and, notwithstanding Section 1362, can represent the interests of the Tribes in state court. Significantly, the United States does not admit such conflicts of interest exist. Memorandum of the United States 23, Pet. App. 52. In fact, the United States continues to represent the Tribes in these federal proceedings. The Tribes do not argue that conflicts of interest absolutely prohibit the United States from representing any of the interests of the Tribes.[3] Instead,

---

[3]It would be imprudent for the Tribes to argue that the conflicts of interest prohibit the United States from represent-

(Continued on following page)

the Tribes have emphasized that conflicts of interest "disable" the United States if the United States represents the Tribes in *state* court. We submit that if such a conflict of interest does exist,[4] it would prevent the United States from representing the Tribes regardless of the forum.

None of the respondents contend that the opinion of the Ninth Circuit is completely correct. It is obvious that if the opinion and judgment stand unreviewed by this Court, the water adjudication systems of the western disclaimer states will be seriously disrupted. *See*, Amicus briefs of the states of Alaska, Idaho, Nevada, New Mexico, North Dakota, South Dakota, Utah, Washington and Wyoming. The petition for a writ of certiorari to the Ninth

---

(Continued from previous page)

ing the Tribes' interests in every aspect of the federal proceedings, for it would deprive several of the Tribes of any cases in which to intervene. With the exception of the complaint filed by the Northern Cheyenne Tribe, United States initiated all actions in federal court on behalf of the Tribes. The Crow Tribe attempted to intervene in the proceedings, and the Assiniboine and Sioux Tribes were permitted to intervene in the proceedings almost simultaneously with the filing of the complaint pertaining to their reserved water rights. The Confederated Salish and Kootenai Tribes did not move to intervene in the proceedings until almost four months after the United States filed notices of appeal from the district court decision. The tribes living on the Blackfeet, Rocky Boy's and Fort Belknap reservations in Montana have not participated in any of these proceedings, apparently acknowledging that the representation by the United States is adequate and proper.

[4]In the view of the United States and the petitioners, conflicts of interest do not exist merely because the United States represents both the Tribes and federal agencies claiming reserved water rights. In all of its complaints on file in the district court, the United States has acknowledged the reserved rights of the Tribes it represents, and has acknowledged that those rights predate any reserved or appropriative rights of the United States.

Circuit Court of Appeals should be granted, and the decision below should be summarily reversed.

Respectfully submitted,

MICHAEL T. GREELY
Attorney General for the
State of Montana

HELENA S. MACLAY
DEIRDRE BOGGS
Special Assistant Attorneys General
P. O. Box 8957
Missoula, Montana 59807
(406) 721-5440

Attorneys for Petitioner
State of Montana

CALE CROWLEY
CROWLEY, HAUGHEY, HANSON,
TOOLE & DIETRICH
P. O. Box 2529
Billings, Montana 59103

MAURICE R. COLBERG, Jr.
HIBBS, SWEENEY, COLBERG,
JENSEN & KOESSLER
P. O. Box 2175
Billings, Montana 59103

JAMES E. SEYKORA
BERT W. KRONMILLER
P. O. Drawer S
Hardin, Montana 59034

DOUGLAS Y. FREEMAN
631 N. Center
Hardin, Montana 59034

Counsel for Private Petitioners

September, 1982